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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 ROBERT ANTHONY HIGH,

9 *Petitioner,*

10 vs.

11 DWIGHT NEVENS, et al.,

12 *Respondents.*
13
14

2:11-cv-00891-APG-VCF

ORDER

15 This is petitioner's first amended petition for writ of habeas corpus pursuant to 28 U.S.C. §
16 2254, filed through counsel (Dkt. #21). Before the court is respondents' motion to dismiss (Dkt. #49).
17 Petitioner opposed the motion (Dkt. #51), and respondents replied (Dkt. #55).

18 **I. Procedural History and Background**

19 On October 30, 2008, a jury found petitioner guilty of count 1: first-degree kidnapping; counts
20 2,3,4,6,7, and 10: lewdness with a child under age fourteen; count 5: sexual assault of a minor under
21 age fourteen; and count 9: administration of a drug to aid commission of a felony; and not guilty of
22 count 8: attempted lewdness with a child under age fourteen.¹ Exhs. 66-67.²
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25 ¹ The child is identified in the briefs and here as "S.S."

26 ² Exhibits 1-182 were filed with petitioner's first amended petition (Dkt. #21) and may be
27 found at Dkt. #s 22-29. Exhibits 183-184 were filed as supplemental exhibits to petitioner's first
28 amended petition and may be found at Dkt. #46. Exhibit 185 was filed with respondents' motion to
dismiss (Dkt. #49) and may be found at Dkt. #50.

1 On January 15, 2009, the state district court sentenced petitioner as follows: count 1: five years
2 to life; counts 2, 3, 4, 6, 7, 10: ten years to life on each count, to run concurrently to each other and to
3 count 1; count 5: twenty years to life, consecutive to count 1; and count 9: sixteen to seventy-two
4 months, to run concurrently with counts 1-7. Exh. 69 at 12-14. The court filed the judgment of
5 conviction on January 27, 2009. Exh. 71.

6 Petitioner appealed. Exh. 73. The Nevada Supreme Court affirmed his convictions on February
7 3, 2010, and remittitur issued on March 2, 2010. Exhs. 94, 95.

8 On June 10, 2010, petitioner filed his first proper person state postconviction petition for writ
9 of habeas corpus. Exh. 103. On September 16, 2010, the state district court orally denied the petition,
10 and the court filed findings of fact, conclusions of law and order denying the petition on November 22,
11 2010. Exhs. 2, 112. The Nevada Supreme Court affirmed the denial of the first state postconviction
12 petition on April 6, 2011, and remittitur issued on July 6, 2011. Exhs. 118, 123.

13 Meanwhile, on or about March 23, 2011, petitioner dispatched his first federal habeas petition.
14 2:11-cv-0454-JCM-LRL, Dkt. #1-1. On April 1, 2011, the district court dismissed the petition without
15 prejudice as wholly unexhausted due to petitioner's pending appeal of the denial of his first state
16 postconviction petition. 2:11-cv-0454-JCM-LRL, Dkt. #7. The court also denied petitioner's motion
17 for stay and abeyance and denied a certificate of appealability. *Id.* at 2-3.

18 The Ninth Circuit granted petitioner a certificate of appealability on two issues:

19 (1) [W]hether the district court improperly determined that the petition was
20 wholly unexhausted, and, if not, (2) whether the district court has discretion to use the
21 stay and abeyance procedure outlined in *Rhines v. Weber*, 544 U.S. 269 (2005), and
Pace v. DiGuglielmo, 544 U.S. 408 (2005), to stay and hold in abeyance a habeas
petition containing only unexhausted claims.

22 Case No. 11-16139, Dkt. #2-1 at 1.

23 Also before the Nevada Supreme Court affirmed the denial of the first state postconviction
24 petition, petitioner filed a second proper person state postconviction petition on April 4, 2011. Exh.
25 116. The state district court denied the petition as untimely pursuant to NRS 34.726 and successive
26 pursuant to NRS 34.810(1)(b)(2). Exh. 127. On April 11, 2012, the Nevada Supreme Court affirmed
27 the denial of the second state postconviction petition as untimely and successive and an abuse of the
28

1 writ, and concluded that petitioner failed to demonstrate good cause to excuse the procedural bars. Exh.
2 134. Remittitur issued on May 8, 2012. Exh. 136.

3 Before the Nevada Supreme Court issued the order affirming the denial of the first state
4 postconviction petition and while the second state postconviction petition was pending, petitioner
5 dispatched the instant second federal petition on May 27, 2011 (Dkt. #7). The Ninth Circuit granted
6 petitioner's motion to defer briefing on the appeal of his first federal petition pending resolution of his
7 second federal petition. Case No. 11-16139, Dkt. #s 8, 9.

8 Petitioner filed a counseled amended federal petition on May 30, 2012 (Dkt. #21). The court
9 granted petitioner's motion for leave to conduct discovery (Dkt. #s 32, 39). Following discovery,
10 petitioner filed supplemental exhibits but did not further amend his petition (Dkt. #s 45, 46).
11 Respondents now move to dismiss this petition, arguing that the claims are unexhausted and/or
12 procedurally barred (Dkt. #49).

13 **II. Legal Standards**

14 **A. Exhaustion**

15 A federal court will not grant a state prisoner's petition for habeas relief until the prisoner has
16 exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28
17 U.S.C. § 2254(b). A petitioner must give the state courts a fair opportunity to act on each of his claims
18 before he presents those claims in a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844
19 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the
20 petitioner has given the highest available state court the opportunity to consider the claim through direct
21 appeal or state collateral review proceedings. *See Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004);
22 *Garrison v. McCarthy*, 653 F.2d 374, 376 (9th Cir. 1981).

23 A habeas petitioner must "present the state courts with the same claim he urges upon the federal
24 court." *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal constitutional implications of a claim,
25 not just issues of state law, must have been raised in the state court to achieve exhaustion. *Ybarra v.*
26 *Sumner*, 678 F. Supp. 1480, 1481 (D. Nev. 1988) (citing *Picard*, 404 U.S. at 276)). To achieve
27 exhaustion, the state court must be "alerted to the fact that the prisoner [is] asserting claims under the
28 United States Constitution" and given the opportunity to correct alleged violations of the prisoner's

1 federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); see *Hiivala v. Wood*, 195 F.3d 1098, 1106
2 (9th Cir. 1999). It is well settled that 28 U.S.C. § 2254(b) “provides a simple and clear instruction to
3 potential litigants: before you bring any claims to federal court, be sure that you first have taken each
4 one to state court.” *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir. 2001) (quoting *Rose v. Lundy*, 455 U.S.
5 509, 520 (1982)). “[G]eneral appeals to broad constitutional principles, such as due process, equal
6 protection, and the right to a fair trial, are insufficient to establish exhaustion.” *Hiivala v. Wood*, 195
7 F.3d 1098, 1106 (9th Cir. 1999) (citations omitted). However, citation to state caselaw that applies
8 federal constitutional principles will suffice. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003)
9 (en banc).

10 A claim is not exhausted unless the petitioner has presented to the state court the same operative
11 facts and legal theory upon which his federal habeas claim is based. *Bland v. California Dept. Of*
12 *Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The exhaustion requirement is not met when the
13 petitioner presents to the federal court facts or evidence which place the claim in a significantly different
14 posture than it was in the state courts, or where different facts are presented at the federal level to
15 support the same theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge v.*
16 *Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455, 458 (D. Nev.
17 1984).

18 **B. Procedural Bar**

19 “Procedural default” refers to the situation where a petitioner in fact presented a claim to the
20 state courts but the state courts disposed of the claim on procedural grounds, instead of on the merits.
21 A federal court will not review a claim for habeas corpus relief if the decision of the state court
22 regarding that claim rested on a state law ground that is independent of the federal question and
23 adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991).

24 The *Coleman* Court stated the effect of a procedural default, as follows:

25 In all cases in which a state prisoner has defaulted his federal claims in
26 state court pursuant to an independent and adequate state procedural rule,
27 federal habeas review of the claims is barred unless the prisoner can
28 demonstrate cause for the default and actual prejudice as a result of the
alleged violation of federal law, or demonstrate that failure to consider
the claims will result in a fundamental miscarriage of justice.

1 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986). The procedural
2 default doctrine ensures that the state's interest in correcting its own mistakes is respected in all federal
3 habeas cases. *See Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2003).

4 To demonstrate cause for a procedural default, the petitioner must be able to "show that some
5 *objective factor external to the defense* impeded" his efforts to comply with the state procedural rule.
6 *Murray*, 477 U.S. at 488 (emphasis added). For cause to exist, the external impediment must have
7 prevented the petitioner from raising the claim. *See McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

8 **III. Instant Petition**

9 **Ground 1**

10 Petitioner alleges that his Sixth and Fourteenth Amendment rights to due process and a fair trial
11 were violated when the prosecution repeatedly used improper arguments during closing arguments
12 (Dkt. #21, p. 17).

13 **Ground 1(A)**

14 Petitioner claims that a comparison of the jury instructions with the State's closing arguments
15 reveals that the prosecution was asking the jury to ignore the court's instructions and do justice for S.S.
16 as they defined it by ignoring the seemingly unusual behavior of S.S.'s family and the Las Vegas
17 Metropolitan Police Department ("Metro") crime laboratory's multiple failures and instead act
18 independently out of "common sense." *Id.* at 19-21. Petitioner argues that the prosecution further
19 asked the jury to graft a so-called "child's standard," which is nonexistent under Nevada law, onto the
20 court's credibility instruction. *Id.* Petitioner asserts that such actions urged the jurors to create their
21 own legal standard rather than apply the one the court provided, a practice commonly known as "jury
22 nullification." *Id.* at 21.

23 Respondents argue that, while petitioner raised the Golden Rule claim in federal ground 1(B)
24 on direct appeal, he did not claim that the prosecutor encouraged jury nullification or represented the
25 case as being S.S. versus petitioner instead of the State versus petitioner (Dkt. #49, pp. 9-10). In
26 petitioner's direct appeal, he quoted the same language from the prosecutor's closing arguments,
27 urging the jury that S.S. should not be held responsible for the bad decisions of adults around her, for
28 the mistakes of the Metro lab and that S.S. deserved the jury's application of their common sense.

1 Exh. 86 at 15; Dkt. #21 at 19. However, in the direct appeal this language is clearly cited in support
2 of petitioner's assertion that the prosecutor committed misconduct by using a "Golden Rule" argument
3 that asks jurors to put themselves in an alleged victim's shoes. Exh. 86 at 15-16. In his first state pro
4 se habeas petition, petitioner claims that his Fifth, Sixth, and Fourteenth Amendment rights were
5 violated when the prosecutor made several outrageous statements, including his statement in closing
6 arguments: "And you promised me you'd hold her to a child's standard." Exh. 103 at 30, 32.
7 Petitioner presents no other facts or argument regarding a child standard. In the federal claim,
8 however, petitioner argues that the prosecutor used voir dire to begin the process of coercing jurors
9 into accepting a more lenient standard for evaluating S.S.'s credibility, a so-called "child standard."
10 He argues the prosecution ultimately urged the jury to graft such a standard onto the court's witness
11 credibility instruction and thus use this jury-created legal standard rather than apply the court's
12 standard, which encouraged jury nullification. The court has carefully reviewed the grounds presented
13 to the Nevada Supreme Court with federal ground 1(A) and concludes that the instant ground does not
14 present the same operative facts and legal theory that were presented to the state courts. *Bland*, 20
15 F.3d at 1473. While, in a single phrase in his first state postconviction petition, petitioner referred to
16 a child's standard, the facts asserted in federal ground 1(A)—that the prosecution set out from voir dire
17 to encourage the jury to apply its own credibility standard and thereby engage in jury
18 nullification—present different facts that place the claim in a significantly different posture than it was
19 in the state courts. *See, e.g., Nevius*, 852 F.2d at 470. Accordingly, ground 1(A) is unexhausted.

20 **Ground 1(C)**

21 Petitioner claims that the prosecution improperly disparaged his defense as "smoke and
22 mirrors" and that the State disparaged the integrity of the defense's forensic interview expert by
23 suggesting that he had sold his opinions to the defense instead of testifying truthfully (Dkt. #21 at 21).

24 Respondents now concede that the claim that the prosecution disparaged the defense with
25 comments such as "smoke and mirrors" is exhausted (Dkt. #55, p. 9). However, respondents are
26 correct that, despite petitioner's general statement of exhaustion of ground 1, he did not raise the claim
27 that the prosecution disparaged the integrity of the defense's forensic interview expert by suggesting
28 that he sold his statements to the defense either on direct appeal or in his appeal to the Nevada

1 Supreme Court of the denial of his first state postconviction petition. Accordingly, the claim in ground
 2 1(C) that the prosecution disparaged the integrity of the defense's forensic interview expert by
 3 suggesting that he sold his statements to the defense instead of testifying truthfully is unexhausted.

4 **Ground 2**

5 Petitioner claims that his Sixth and Fourteenth Amendment rights to effective assistance of
 6 counsel were violated when trial counsel failed to present expert testimony regarding the reliability of
 7 Metro's crime laboratory and its test results in this case and to effectively object to such evidence (Dkt.
 8 #21 at 22).

9 Petitioner argues that ground 2 was exhausted in grounds 11 and 13 of his first state
 10 postconviction petition (Dkt. #51, pp. 9-12). In ground 11 of the state petition, petitioner asserted trial
 11 counsel rendered ineffective assistance as follows:

12 Trial counsel failed to object to the admittance of prosecution's mislabeled and
 13 contaminated DNA evidence.

14 The DNA (saliva) evidence used at trial was contaminated due to mislabeling of the
 15 swabs by the Las Vegas Metropolitan Police Department.

16 It was petitioner's own buccal swab labeled (JM-4) that was tested against his own
 17 chest swabs....

18 Furthermore, there were other numerous mistakes with the labeling of other DNA
 19 swabsThe State never retested any of the DNA. . . .

20 Trial counsel's failure to object to the prosecutor having contaminated DNA evidence
 21 admitted into evidence

22 Exh. 103 at 39-40.

23 In ground 13 of the first state postconviction petition, petitioner asserted trial counsel rendered
 24 ineffective assistance:

25 Trial counsel failed to call an expert in forensic science to prove that the DNA (saliva)
 26 could not be re-tested because of all the mislabeling errors which contaminated the
 27 entire DNA evidence.

28 Exh. 103 at 45.

The court agrees with respondents that the claims in federal ground 2 that trial counsel was
 ineffective for failing to present expert testimony as to the policies and procedures of Metro's crime
 laboratory were not presented to the Nevada Supreme Court, and therefore, that portion of ground 2

1 is unexhausted. The court concludes that the following portion of ground 2 is exhausted: trial counsel
2 rendered ineffective assistance of counsel in violation of petitioner's Sixth and Fourteenth Amendment
3 rights by failing to object to the following: the admittance of prosecution's mislabeled and
4 contaminated DNA evidence, including that the DNA (saliva) evidence was contaminated due to
5 mislabeling of the swabs by Metro, that it was petitioner's own buccal swab labeled (JM-4) that was
6 tested against his own chest swabs, and that the State never retested any of the DNA; and also by
7 failing to call an expert in forensic science to prove that the DNA (saliva) could not be re-tested
8 because of all the mislabeling errors, which contaminated the entire DNA evidence.

9 The court further concludes that all other claims set forth in federal ground 2 are unexhausted.

10 **Ground 3**

11 Petitioner claims that there was insufficient evidence to support his convictions for kidnapping,
12 sexual assault and lewdness (Dkt. #21, pp. 29-34).

13 Respondents argue that ground 3 is procedurally barred (Dkt. #49, pp. 18-19). They state that
14 petitioner first raised this claim in his state postconviction petition (Exh. 103 at 19-25) and that the
15 Nevada Supreme Court clearly and expressly invoked NRS 34.810 to affirm the denial of all claims
16 other than ineffective assistance of counsel claims because they were reasonably available to be raised
17 on direct appeal and petitioner failed to demonstrate good cause for his failure to do so. *Id.*; Exh. 118
18 at 2, n.2. Respondents contend that this state-law ground is an independent and adequate state law
19 basis that bars this claim from review in this federal habeas proceeding (ECF #21, p. 14).

20 Under Nevada law, the court shall dismiss a state postconviction petition if petitioner was
21 convicted pursuant to a jury trial and the claim could have been raised in a direct appeal. Petitioner
22 bears the burden of proving good cause for his failure to present the claim and of proving actual
23 prejudice. NRS 34.810(1)(b)(2). Here, the Nevada Supreme Court explicitly relied on NRS 34.810
24 when it declined to review the state habeas petition claim that corresponds to ground 3 of the federal
25 habeas petition. Exh. 118 at 2, n.2. The Ninth Circuit Court of Appeals has held that, at least in
26 non-capital cases, application of the procedural bar at issue in this case – NRS 34.810 – is an
27 independent and adequate state ground. *Vang v. Nevada*, 329 F.3d 1069, 1073-75 (9th Cir. 2003); *see*
28 *also Bargas v. Burns*, 179 F.3d 1207, 1210-12 (9th Cir. 1999).

1 Thus, the Nevada Supreme Court's holding that the claim raised here as federal ground 3 was
2 procedurally defaulted under NRS 34.810(1)(b)(2) was an independent and adequate ground for the
3 court's dismissal of that ground in the state postconviction petition. Federal habeas review of the
4 claims is, therefore, barred unless petitioner can demonstrate cause for the default and actual prejudice
5 as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will
6 result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750; *Murray*, 477 U.S. at 485.

7 In opposing the motion to dismiss, petitioner argues that, here, ineffective assistance of
8 appellate counsel constitutes cause (Dkt. #51, pp. 25-26). Ineffective assistance of counsel may
9 constitute cause for procedural default. *Murray*, 477 U.S. at 488-489. Under *Strickland v.*
10 *Washington*, a petitioner must show that his counsel's performance was both unreasonably deficient
11 and that the defense was actually prejudiced as a result of counsel's errors. 446 U.S. 668, 684 (1984).
12 The *Strickland* standard also applies to claims of ineffective appellate counsel. *Smith v. Robbins*, 528
13 U.S. 259, 285 (2000). Appellate counsel has no constitutional duty to raise every non-frivolous issue
14 requested by the client. *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983). To state a claim of ineffective
15 assistance of appellate counsel, a petitioner must demonstrate: (1) that counsel's performance was
16 deficient in that it fell below an objective standard of reasonableness, and (2) that the resulting
17 prejudice was such that the omitted issue would have a reasonable probability of success on appeal.
18 *Smith*, 528 U.S. at 285. "Experienced advocates since time beyond memory have emphasized the
19 importance of winnowing out weaker arguments on appeal and focusing on one central issue if
20 possible, or at most on a few key issues." *Jones*, 463 U.S. at 751-52. Petitioner must show that his
21 counsel unreasonably failed to discover and file nonfrivolous issues. *Delgado v. Lewis*, 223 F.3d 976,
22 980 (9th Cir. 2000). It is inappropriate to focus on what could have been done rather than focusing on
23 the reasonableness of what counsel did. *Williams v. Woodford*, 384 F.3d 567, 616 (9th Cir. 2004)
24 (citation omitted).

25 Here, petitioner argues that appellate counsel unreasonably failed to present several meritorious
26 issues, including "the admissibility of insufficient evidence to convict, including inconsistent
27 statements by the alleged victim" (Dkt. #51, p. 25). He states that the failure to raise this issue (among
28 others) "engendered substantial prejudice because the failure worked to [petitioner's] actual and

1 substantial disadvantage.” *Id.* at 26. These conclusory, general statements, however, provide no
2 support for cause and prejudice. Petitioner has not even argued, let alone established, that the resulting
3 “substantial” prejudice was such that the omitted issue would have had a reasonable probability of
4 success on appeal. *Smith*, 528 U.S. at 285.

5 Petitioner also asserts that because he was denied counsel for his state postconviction petition,
6 under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), he may be able to demonstrate cause and prejudice
7 for the default of this claim. Respondents correctly point out, however, that federal ground 3 is a
8 substantive claim and raises neither ineffective assistance of trial counsel nor ineffective assistance
9 of appellate counsel (Dkt. #55 p. 27). Therefore, *Martinez* and subsequent cases that discuss an
10 equitable exception to the procedural default bar of certain claims of ineffective assistance of trial
11 counsel raised for the first time in collateral proceedings are inapposite.

12 Accordingly, this court determines that the Nevada Supreme Court’s holding that the claim
13 raised here as federal ground 3 was procedurally barred under NRS 34.810(1)(b)(2) was an
14 independent and adequate ground for the court’s dismissal of that claim in the state postconviction
15 petition. Further, petitioner has failed to demonstrate good cause and prejudice to overcome the
16 procedural default. Thus, the court grants respondents’ motion to dismiss ground 3 with prejudice as
17 procedurally barred.

18 **Ground 4**

19 Petitioner claims that his twenty-five years to life sentence constitutes excessive punishment
20 in violation of his Eighth and Fourteenth Amendment rights (Dkt. #21, pp. 34-35). He asserts that
21 because S.S. had no injuries and his prior convictions were old and were for property crimes, that the
22 sentence was excessive and grossly disproportionate to the crimes for which he was found guilty.

23 In his direct appeal, petitioner argued that his twenty years to life sentence for sexual assault
24 violated his Eighth Amendment rights. He asserted that being sentenced to spend the rest of his life
25 in prison for a single act of sexual assault, which did not cause bodily harm, let alone substantial
26 bodily harm, is cruel and unusual punishment in violation of the Eighth Amendment. Exh. 86 at 18-
27 19.

1 Respondents argue that federal ground 4 alters the claim such that it is unexhausted (Dkt. #49,
2 pp. 12-13). However, the court agrees with petitioner that the reference in the federal petition to
3 petitioner's total sentence of twenty-five years to life does not fundamentally alter the claim because
4 the essential factual and legal theory is the same as what was presented to the Nevada Supreme Court
5 (Dkt. #51, p. 12). *See Robinson v. Chriro*, 595 F.3d 1086, 1102, n.14 (9th Cir. 2010) (citing *Picard*
6 *v. Connor*, 404 U.S. 270, 278 (1971)). Accordingly, ground 4 is exhausted.

7 **Ground 5**

8 Petitioner claims that appellate counsel, acting in disregard of a conflict of interest, performed
9 deficiently in failing to include several meritorious claims in petitioner's direct appeal, in violation of
10 his Sixth and Fourteenth Amendment rights to effective and conflict-free appellate counsel (Dkt. #21,
11 pp. 35-36). Petitioner alleges that a conflict of interest existed because a Clark County Public
12 Defender filed a motion to withdraw as trial counsel, which was granted. Petitioner did not waive the
13 conflict. After conviction, the Clark County Public Defender's office was again appointed to represent
14 petitioner, and appellate counsel failed to withdraw or secure a waiver of conflict. *Id.* at 36. Petitioner
15 also claims that appellate counsel failed to have any contact with him during or regarding the appeal.
16 He claims that appellate counsel unreasonably failed to present the following meritorious appellate
17 issues to the Nevada Supreme Court: (1) the State's use of mislabeled, unreliable and contaminated
18 DNA evidence; (2) the admissibility of insufficient evidence to convict, including inconsistent
19 statements by the alleged victim; (3) sentencing petitioner for redundant convictions; and (4) court's
20 failure to properly assess the alleged victim's competency to testify. *Id.*

21 The court agrees with respondents that petitioner failed to raise the appellate issue that he
22 includes here in ground 5: that appellate counsel unreasonably failed to present the issue of the court's
23 failure to properly assess the victim's competency to testify (*see* Dkt. #49, pp. 13-14). While petitioner
24 points out that he raised the substantive claim in ground 17 of his first state postconviction petition
25 (Dkt. #51, p. 13), he did not raise it as an ineffective assistance of counsel claim. Exh. 103 at 51.
26 Thus, that portion of ground 5 is unexhausted. *Kelly v. Small*, 315 F.3d 1063, 1068 n.2 (9th Cir. 2003),
27 overruled on other grounds by *Robbins v. Carey*, 481 F.3d 1143 (9th Cir. 2007) (petitioner must set
28 forth ineffective assistance of counsel claim as an independent constitutional claim to provide state

1 court “full and fair opportunity” to act on it, rather than hoping the court would infer a Sixth
2 Amendment claim).

3 However, the remaining claims in ground 5 were presented in grounds 21 and 22 of petitioner’s
4 first state postconviction petition, and therefore, the remaining claims in ground 5 are exhausted.

5 **Ground 6**

6 Petitioner claims that trial counsel rendered ineffective assistance in violation of his Sixth and
7 Fourteenth Amendment rights when he failed to (1) object to prosecutorial misconduct in general and
8 specifically as set forth in ground 1; and (2) move for an independent psychological examination of
9 the alleged victim due to her inconsistent and unreliable statements (Dkt. #21, pp. 36-37).

10 Petitioner argues that he exhausted the claims in ground 6(1) by presenting them in his first
11 state postconviction petition (Dkt. #21, p. 36). However, there he claimed only that “trial counsel
12 failed to object to prosecutorial misconduct throughout trial.” Exh. 103 at 50. The court agrees with
13 respondents that petitioner did not incorporate what now constitutes the federal ground 6(1) specific
14 substantive claims of prosecutorial misconduct in his first state postconviction ineffective assistance
15 of counsel claims (Dkt. #55, p. 17). Accordingly, ground 6(1) is unexhausted.

16 With respect to ground 6(2), petitioner incorporates several specific allegations regarding the
17 alleged victim’s inconsistent statements from federal ground 3 (Dkt. #21, pp. 29-34). However, the
18 court agrees with respondents that the only specific allegation that petitioner set forth in his first state
19 postconviction is that trial counsel was ineffective for failing to move for an independent psychological
20 examination of the alleged victim due to her inconsistent statements because when interviewed by
21 Detective Twers on February 24, 2007, she told him that nothing happened and said “I don’t
22 remember.” Exh. 103 at 42. Accordingly, that claim in ground 6(2) is exhausted, and the remaining
23 claims in ground 6(2) are unexhausted.

24 **Ground 7**

25 Petitioner claims that the cumulative effect of errors raised on appeal and in this petition entitle
26 him to habeas relief (Dkt. #21, p. 37). He points to ground 20 of his first state postconviction petition
27 in support of his contention that federal ground 7 is exhausted. However, respondents are correct that
28 ground 7 is only partially exhausted because several grounds or portions of grounds upon which

ground 7 relies are unexhausted. Accordingly, ground 7 is exhausted only to the extent that all or portions of grounds 1-6 are exhausted.

IV. Petitioner's Options Regarding Unexhausted Claims

A federal court may not entertain a habeas petition unless the petitioner has exhausted available and adequate state court remedies with respect to all claims in the petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A "mixed" petition containing both exhausted and unexhausted claims is subject to dismissal. *Id.* In the instant case, the court finds that: ground 1(A) is unexhausted; portions of grounds 1(C), 2, 5, 6, and 7 are unexhausted; ground 3 is procedurally barred; and ground 4 is exhausted. Accordingly, this is a "mixed petition," containing both exhausted and unexhausted claims, and petitioner, through counsel, has these options:

1. He may submit a sworn declaration voluntarily abandoning the unexhausted claim in his federal habeas petition, and proceed only on the exhausted claims;
2. He may return to state court to exhaust his unexhausted claim, in which case his federal habeas petition will be denied without prejudice; or
3. He may file a motion asking this court to stay and abey his exhausted federal habeas claims while he returns to state court to exhaust his unexhausted claim.

With respect to the third option, a district court has discretion to stay a petition that it may validly consider on the merits. *Rhines v. Weber*, 544 U.S. 269, 276, (2005). The *Rhines* Court stated:

[S]tay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State").

Rhines, 544 U.S. at 277.

Accordingly, if petitioner files a motion for stay and abeyance, he would be required to show good cause for his failure to exhaust his unexhausted claims in state court, and to present argument regarding the question whether or not his unexhausted claims are plainly meritless. Respondent would then be granted an opportunity to respond, and petitioner to reply.

Petitioner's failure to choose any of the three options listed above, or seek other appropriate

1 relief from this court, will result in his federal habeas petition being dismissed. Petitioner is advised
2 to consider the limitations periods for filing federal habeas petitions contained in 28 U.S.C. § 2244(d),
3 as those limitations periods may have a direct and substantial effect on whatever choice he makes
4 regarding his petition.

5 **V. Conclusion**

6 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss petitioner's first
7 amended petition (Dkt. #49) is **GRANTED** in part and **DENIED** in part as follows:

8 1. Ground 1(A) is **UNEXHAUSTED**.

9 2. The claim in ground 1(C) that the prosecution disparaged the defense with comments such
10 as "smoke and mirrors" is **EXHAUSTED**.

11 3. The claim in ground 1(C) that the prosecution disparaged the integrity of the defense's
12 forensic interview expert by suggesting that he had sold his opinions to the defense instead of testifying
13 truthfully is **UNEXHAUSTED**.

14 4. The following portion of ground 2: trial counsel rendered ineffective assistance of counsel
15 in violation of petitioner's Sixth and Fourteenth Amendment rights by failing to object to the
16 following: the admittance of prosecution's mislabeled and contaminated DNA evidence, including
17 that the DNA (saliva) evidence was contaminated due to mislabeling of the swabs by Metro, that it was
18 petitioner's own buccal swab labeled (JM-4) that was tested against his own chest swabs, and that the
19 State never retested any of the DNA; and also by failing to call an expert in forensic science to prove
20 that the DNA (saliva) could not be re-tested because of all the mislabeling errors, which contaminated
21 the entire DNA evidence is **EXHAUSTED**.

22 5. All other claims in ground 2 are **UNEXHAUSTED**.

23 6. Ground 3 is **dismissed with prejudice as PROCEDURALLY BARRED**.

24 7. Ground 4 is **EXHAUSTED**.

25 8. The claim in ground 5 that appellate counsel unreasonably failed to present the issue of the
26 court's failure to properly assess the victim's competency to testify is **UNEXHAUSTED**.

27 9. All other claims in ground 5 are **EXHAUSTED**.

28 10. Ground 6(1) is **UNEXHAUSTED**.

1 11. The claim in ground 6(2) that trial counsel was ineffective for failing to move for an
2 independent psychological examination of the alleged victim due to her inconsistent statements
3 because when interviewed by Detective Twers on February 24, 2007, she told him that nothing
4 happened and said "I don't remember" is **EXHAUSTED**.

5 12. The remaining claims in ground 6(2) are **UNEXHAUSTED**.

6 13. Ground 7, a cumulative error claim, is **partially EXHAUSTED** only to the extent that all
7 or portions of grounds 1-6 are exhausted.

8 **IT IS FURTHER ORDERED** that petitioner, through counsel, shall have **thirty (30) days**
9 to either: **(1)** inform this court in a sworn declaration that he wishes to formally and forever abandon
10 the unexhausted ground for relief in his federal habeas petition and proceed on the exhausted grounds;
11 **OR (2)** inform this court in a sworn declaration that he wishes to dismiss this petition without
12 prejudice in order to return to state court to exhaust his unexhausted claim; **OR (3)** file a motion for
13 a stay and abeyance, asking this court to hold his exhausted claims in abeyance while he returns to state
14 court to exhaust his unexhausted claim. If petitioner chooses to file a motion for a stay and abeyance,
15 or seek other appropriate relief, respondents may respond to such motion as provided in Local Rule
16 7-2.

17 **IT IS FURTHER ORDERED** that if petitioner elects to abandon his unexhausted ground,
18 respondents shall have **thirty (30) days** from the date petitioner serves his declaration of abandonment
19 in which to file an answer to petitioner's remaining grounds for relief. The answer shall contain all
20 substantive and procedural arguments as to all surviving grounds of the petition, and shall comply with
21 Rule 5 of the Rules Governing Proceedings in the United States District Courts under 28 U.S.C.
22 §2254.

23 **IT IS FURTHER ORDERED** that petitioner shall have **thirty (30) days** following service
24 of respondents' answer in which to file a reply.
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1 **IT IS FURTHER ORDERED** that if petitioner fails to respond to this order within the time
2 permitted, this case may be dismissed.

3 Dated: March 2, 2015.

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5 UNITED STATES DISTRICT JUDGE
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